REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 9253/99

In the matter between:

J.P.D.P.	**1st Plaintiff**
E.Z.	**2nd Plaintiff**
J.Z.	**3rd Plaintiff**
D.W.W.	**4th Plaintiff**

and

IMKER MAREE HOOGENHOUT	**1st Defendant**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**2nd Defendant**

JUDGMENT: 23 MAY 2003

NEL, J:

On 19 August 1999 the four Plaintiffs served a summons on the First Defendant

(*Hoogenhout*) claiming damages for mental illness, psycological disturbance and other injuries alledgedly caused by sexual assaults to which they had been subjected as children during the period 1956 to 1965. First and Fourth Plaintiffs ('*D.P. and W.*') are sisters and are cousins of Second and Third Plaintiffs ('*E.Z.J.Z.,')* are sister and brother. *Hoogenhout*is married to an aunt of the plaintiffs, namely a third sister of their two mothers.

Hoogenhout denied the allegations and in the alternative pleaded that the claims had become prescribed.

The period of extinctive prescription of a claim for damages arising from a delict is three years from the date upon which the debt becomes due. (the 1969 Prescription Act upon which *Hoogenhout* relied).

Usually this would be date upon which the delict is committed, but in terms of section 12(3) of the Act

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'

In addition, if the period of extinctive prescription is completed whilst the creditor is a minor, the completion is delayed until the expiry of one year after the attainment of majority. (sec 13)

Hoogenhout pleaded that *E. Z.'s* claims had prescribed in that

- the sexual assaults had allegedly occurred during the period November 1958 to 1965;

- she had attained majority during 1973;

- she had at all times been aware of his identity and of the facts from which her claims had arisen, or alternatively, she could have acquired such knowledge by exercising reasonable care;

In reply thereto and also relying upon the 1969 Act, *E. Z.* pleaded that

- she had first become aware of the effects and consequences of *Hoogenhout's* sexual assaults on her phyche, personality and ability to function as a person during 1997;

- *Hoogenhout's* debt to her thus only became due during 1997;

- alternatively, until 1997 she had been prevented by superior force from interrupting the running of prescription (sec. 13 (1) (a)).

- alternatively, on the 5th July, 1999, *Hoogenhout* had admitted to *D.P. and W.* that he had played roughly "met julle kinders", which, by necessary implication, included *E.Z.* (sec. 14 (1)) and

- in the further alternative, that sections 10(1) and 11(d) of the 1969 Prescription Act are invalid and not applicable (the three year period of prescription) as they are in conflict with a number of sections of the Constitution of the Republic of South Africa Act 108 of 1996.

The last alternative necessitated the belated joinder of the Minister of Justice and Constitutional Development as a defendant (see Rule 10 A of the High Court Rules).

Pursuant to an agreement reached at a pre-trial conference held on 20 September 2001, the First, Third and Fourth Plaintiffs' actions were postponed *sine die* and only *E. van Z.'s* action proceeded. *Hoogenhout* was not present or represented during the trial. A letter from his attorney was handed in which reads as follows:

"We refer to the above and the telephonic discussion with the writer and yourself on Friday the 19th instant at 3h00 pm, and confirmed that we have telephonically advised our erstwhile client of the fact that the matter will be heard at 10h00 am Tuesday the 23rd October 2001 at the High Court, Cape Town.

Our client's wife has indicated that our client will not be attending the matter. Client has however, insisted that we once again reiterate his view that he is **not** guilty of any of the charges as brought against him by the claimants and that if he had further funds available, he would have fought the matter to the very bitter end."

Initially the Minister was represented by Mr *Yamie*, but at a later stage the constitutional issue (the third alternative) was abandoned and on that aspect only the issue of costs occasioned by the joinder of the Minister remains to be decided.

As pointed out, in her reply to the plea of prescription, and relying upon section 13(1) (a) of the 1969 Act, *E. van Z.* pleaded as a first alternative that she had been prevented by superior force from interrupting the running of prescription.

Section 13(1) (a) of the 1969 Act reads as follows:

"(1) If –

a) the creditor is a minor or is insane or is a person

> under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1);"

There was no evidence that a 'superior force' had prevented *E. van Zyl* from instituting the action at an earlier date.

See also *Louw v Louw and Others* 1933 CPD 163.

The second alternative, namely that on the 5th July, 1999 Hoogenhout had admitted to *D.P.* and *W.* that he had played roughly "met julle kinders", which by necessary implication included *E. van Z.,* cannot succeed. The admission relied upon cannot be equated with an admission of sodomy and rape. In any event, the admission had not been made to *E. van Z.* or her duly authorized agent. See *Pentz v Government of RSA* 1983 (3) 584 (AD) at 594 C-D as follows:

"The second reason is that what s 14 (1) contemplates is an acknowledgment of liability to the creditor or his agent. See *Markham v South African Finance & Industrial Co Ltd* 1962 (3) SA 669 (A) at 676F. Counsel for the Government sought to distinguish that case on the ground that it was decided with reference to s 6(1) (a) of the previous Prescription Act 18 of 1943, the language of which differed from s 14 (1) of the present Act. That is so, but RUMPFF JA said in *Markham's* case (at 676G) that, apart from the wording of s 6(1), there were other considerations which led him to the conclusion that the words, 'acknowledgement by the 'debtor' should be construed as meaning an acknowledgment to the creditor or his agent."

That left the question whether the claims had become prescribed prior to August 1997.

In this regard Mr *Whitehead* who appeared on behalf of *E. van Z.* submitted as follows:

"The Second Plaintiff's case as pleaded is that she 'became aware … only in and during 1997 … of the effects of Defendant's unlawful and indecent conduct on her psyche, personality and ability to function as a person.'
Particulars of Claim paragraph 20 (page 12); amplified as follows:

'Towards the end of 1996' she 'watched a television programme about adult victims who had been sexually abused as children. She thereafter for the first time began to realize that she might not have been responsible nor to blame for the indecent assaults the Defendant had committed. This process was facilitated in 1997 by the Second Plaintiff also disclosing those indecent assaults to … a rape crisis counselor in Port Elizabeth. In the course of that counseling the Third Plaintiff (her brother) telephoned her and disclosed that he had also been assaulted by Defendant. She then became aware of the effects …' described above.

The paragraphs in the Particulars of Claim relating to the sexual assaults on *E. van Z.* read as follows:

> **"**16. 16.1 From about November, 1958 when Second Plaintiff was six years old Defendant unlawfully and intentionally indecently assaulted her by:
>
> a) initially touching her vagina; and
> b) thereafter penetrating her vagina and anus with his finger(s);
>
> 16.2 When Second Plaintiff was about seven years old the Defendant

commenced unlawfully and intentionally to:

(a) sodomise her; and
(b) indecently assault her by placing his penis in her mouth;

16.3. When Second Plaintiff was approximately eight years old Defendant raped her for the first time;

a) He continued to rape and sodomise her repeatedly over seven years;

16.4 These indecent assaults, acts of sodomy and rapes occurred approximately once a month at the Defendant's residence at the time and on one occasion in his office;

16.5 When Second Plaintiff was fifteen years old she was admitted to Hottentots Holland Hospital due to an alleged appendicitis. She was advised by the nursing staff that:

a) she was pregnant; and
b) underwent an abortion. The aborted child was conceived as a result of Defendant having raped Second Plaintiff;

17. As a result of the aforesaid indecent assaults, sodomy, rapes and abortion Second Plaintiff has endured shock and stress, pain and suffering, contumelia and chronic emotional and

psychological trauma.

18. The sequelae of the aforesaid indecent assaults, sodomy, rapes and abortion is that Second Plaintiff:

18.1 Was degraded and humiliated and has suffered significant impairment to her personality and psyche;

18.2 Suffers from nightmares;

18.3 Started abusing;

a) alcohol during adolescence; and

b) prescription medication for a period during early adulthood;

18.4 Started taking sleeping pills at the age of ten and is unable to sleep unless she takes a sleeping pill;

18.5 Has extremely poor self esteem and feels suicidal;

18.6 Is physically abusive in relationships;

18.7 Is unable to conduct a healthy sexual relationship;

18.8 On occasion intentionally injures herself; and

18.9 Is terrified of the dark.

19. As a consequence of the emotional and psychological difficulties referred to above, Second Plaintiff is obliged to commence a course of psychological

therapy immediately.

20. It was only in and during 1997 that Second Plaintiff became aware of the effects of Defendant's unlawful and intentional conduct on her psyche, personality and ability to function as a person.

The sexual assaults culminated in a pregnancy and in a particularly stressful abortion at the age of 15 when she was in standard seven. Instead of parental support, she was blamed by her parents who refused to believe her.

The *sequelae* were horrific.

Ms Fredman, a clinical psychologist who specializes in the treatment of victims of sexual assault spent approximately 20 hours in consultation with *E. van Zyl* and approximately another 20 hours while she was being evaluated by other experts instructed by *Hoogenhout,* summarised the effects as follows:

"I think if you look as Ms V.Z.'s life story, life history you see that the effects of repeated and severe sexual abuse of a violent nature has affected every aspect of her life, her personality development, her relationships with her primary caretakers, her mother, her father, her siblings, the way she views herself, the way she views her world around her have all been profoundly affected. She lost her ability to trust, to trust adults, to trust friends together with the fact that she's developed and continued to develop defences, protective mechanisms psychologically protective mechanisms that were maladaptive, that were difficult in later life, self-blame, shame, depression, they've all shaped the way she inter-acted with her world. There's not a single aspect in her life, her schooling, her relationships, her personality, her view of the world, have all been severely

affected by the trauma of the abuse."

In summary, a typical pattern of the effects of repeated and severe sexual abuse of a violent nature is exhibited by the Plaintiffs. The histories which they recount shows many of the features, which are now well understood to be associated with such abuse. Their visions and beliefs about themselves, the other people and the world around them have been profoundly affected in a negative way. They have lost their capacity to trust others. Their defensive behaviour patterns, coloured by unresolved anger, undermine their relationships at work and at home. The Plaintiffs' subjective and emotional world has been overwhelmed with negative emotions – self-blame, guilt, anxiety, shame and depression, and they have been irrevocably deprived of their peace of mind. Common strategies victims of CSA turn to reduce psychological suffering is alcohol, substance abuse, or over eating which has been the case with all the Plaintiffs. This in turn has further compromised their life, work and relationships."

The allegations relating to the sexual assaults and their *sequelae* were substantiated by the uncontraverted evidence of *E. Z.* and her friend *Potgieter*.

Although her evidence was not tested by cross-examination, I have no reason to doubt its veracity. Although an emotional wreck, *E. Z.* made a good impression as a witness. There is also no reason why the corrobarative evidence of *Potgieter* should not be accepted.

However, and as pointed out, if she had become aware of the effects and consequences of the assaults prior to August 1996, her claims would have become prescribed in terms of sections 12 and 13(1) (a) and (i) of the 1969 Act.

Mr *Whitehead* submitted that the *onus* was on *Hoogenhout* to establish

- when she had acquired the requisite knowledge of the facts from

which the debt had arisen (section 12(3) and.

- when the extinctive prescription (section 12(1) had commenced to run;

In this regard he referred to *Gericke v Sack* 1978 (1) SA 821 (A) at 824D-828C; *Drennan Maud Rand & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 204B-G; *Santam Ltd V Ethmar* 1999 (2) SA 244 (SCA) at 252B-256G; and *Nedcor Bank Bpk v Regering van Die Republiek van Suid-Afrika* 2001 (1) SA 988 (SCA).

When the provisions of section 13 of the 1969 Act are invoked to establish a delay in the running of prescription, the plaintiff carries the burden of proof. See *Howie JA* as follows in

Absa Bank Bpk v De Villiers 2001(1) SA 481 (SCA) *at* p486 G – 487 C

“Wat bewyslas betref, is dit geykte reg dat die party wat verjaring opper dit moet bewys. Aan die ander kant, indien uitstel van die afloop van verjaring deur die teenparty beweer word waar die betrokke verjaringstermyn andersins klaarblyklik verstryk het, rus die bewyslas nie op die teenparty om sodanige uitsel te bewys nie? ‘n Bevestigende antwoord is *Eagle Versekeringsmaatskappy Bpk 1985 (2) SA 42 (O) te 47F-G*, waar art 13(1)(g) ook ter sprake was en die Hof, sonder bespreking, die stelling gemaak het met ‘n beroep op *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T). In laasgenoemde saak het die tersaaklike verjaringstydperk verstryk tussen die ontstaan van die vordering en die instelling van die geding. Op 728A is gesê dat ‘(d)ie bewyslas is dus op die eiser om stuiting te bewys. *Zingel v Doll* 1939 SWA

13 te bl. 14’

In *Zingel* se saak egter (waar die eiser beweer het dat die verweerder ‘n erkenning gemaak het wat laasgenoemde se verjarings verweer sou ontsenu) was daar slegs ‘n bevel dat die eiser die ‘onus om te begin’ gedra het. Die trefpunt van die algehele bewyslas was nie ter sake nie.

Na my mening moet die antwoord gevind word aan die hand van algemene beginsels. Waar dit duidelik is, sonder meer, dat die verjaringstydperk verstryk het, het die verweerder ‘n volkome verweer: die eis is finaal uitgewis. Indien op stuiting van verjaring of uitstel van die voltooiing van verjaring staatgemaak wil word, is die posisie nie net dat die eiser sal moet begin nie. Indien dit op die getuienis van ‘n besondere saak onseker is of stuiting, of die gebeure waarna in art 13(1) verwys word, plaasgevind het al dan nie, sal die eis in daardie situasie noodwendig moet faal. Die repliek wat deur so ‘n eiser geopper word is dus ‘n aparte geskilpunt ten opsigte waarvan daar ‘n afsonderlike bewyslas (in die sin van die algehele bewyslas) bestaan: *Pillay v Krishna and Another* 1946 AD 946 te 953. In die onderhawige saak het appellant dus die bewyslas gedra om uitstel van voltooiing van verjaring ingevolge art 13(1)(g) te bewys. In besonder verg dit van die eiser om te bewys van wanneer tot wanneer die hoofskuld die voorwerp was van ‘n eis wat teen die insolvente boedel ingedien is.”

In contrast, and how incongruous it might seem, where the provisions of section 12 (3) are involved, the plaintiff carries no *onus* and the defendant who pleads prescription has to prove the date upon which the plaintiff had acquired the requisite knowledge of the facts from which the debt had arisen.

In *Gericke v Sack* 1978 (1) SA 821 (A) *Diemont JA* stated it as follows: (at p. 826 C-827G)

"Mr Cloete, for the respondent, submitted that, in coming to this conclusion, the trial Court had erred. He sought, as it were, to apportion the burden of proof by contending that the onus was on the respondent to prove the defence raised on his special plea but, in so far as the appellant was concerned, the onus was on her to prove the facts on which the exception contained in sec 12(3) of the Act was based. In support of his argument he relied partly on the form in which the pleadings were cast and partly on two cases in which a similar question had arisen where prescription had been pleaded in an action for defamation

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In the earlier of these two cases, *Holmes v. Salzmann*, 1913 O.P.D. 111, MAASDORP, CJ., dismissed, with more candour than courtesy, a ruling which had been laid down

'so long ago as 1856 in case of *Reid v. Van der Walt*, 2 Searle 285, in a judgment which was apparently not written and well-considered, but one given on the spur of the moment immediately after argument.'

That was a ruling in which BELL and CLOETE, JJ., held that

'In an action of damages for slander, the law being that such action is prescribed if not brought within a year after knowledge of the slander on the part of the complainant, it is not incumbent on the plaintiff, bringing his action after the year, to prove that the slander did not come to his knowledge until within a year after the commencement of suit, but it is incumbent on the defendant to plead and prove as matter of defence that the plaintiff was aware of the slander for upwards of a year after it was uttered and yet failed to proceed. (Grotius, 3.35.3, note 6; Voet, 47.10.21.0'

MAASDORP, CJ., held that the ruling in Reid's case was merely an *obiter dictum* and said that in any event neither of the passages cited from Voet and Groenenwegen's note to Grotius lend support to it. He posed the question:

‘Why, then, should the defendant in the present case be called upon the allege in his plea knowledge on the part of the plaintiff, a matter as to which he may be wholly ignorant and of which the plaintiff has of necessity a very special knowledge?’

The decision in *Holmes v. Salzmann* was approved and the reasoning adopted and applied in the second case cited by respondent’s counsel – the case of *Yusaf v. Bailey and Others*, 1964 (4) S.A. 117 (W). This was a matter in which a similar problem faced the court, namely which party must bear the onus of proof which arises where the date on which the defamation was first brought to the knowledge of the claimant is in dispute. VIEYRA, J., is reported at p. 119 of the judgment to have stated:

‘Counsel told me that they could not find any decided cases dealing with this point. There are however two reported cases dealing with the point. The first is that of *Reid v. Van der Walt*, 2 S. 285. Relying on Voet, 47.10.21 and Groenenwegen’s Note 6 to Grotius 3.35.3., the Court came to the conclusion that the onus of pleading and proving that the plaintiff was aware of slander rested on the defendant. The other is *Holmes v. Salzmann*, 1913 O.P.D. 111, in which the Court (MAASDORP, CJ.,) came to the contrary conclusion (see at p.118). It was pointed out that the authorities relied on in the earlier case did not bear out the inference drawn, as indeed is the case. Moreover it would be contrary to principle to cast an onus on a defendant in relation to the facts so peculiarly within the knowledge of the plaintiff. The earliest date from which the period laid down in sec. 3 (2) (b) (i) of the Prescription Act, 18 of 1943, can run is the date of the publication of the defamatory matter. In the vast majority of cases a defendant would have no means of establishing exactly when the plaintiff first learned of the defamation or ascertained the identity of the parties responsible. The conclusion is that the onus must lie on the plaintiff. I respectfully agree with the decision of the Orange Free State Court’

In urging the Court to apply the same reasoning in the case now under consideration, Mr Cloete conceded that *Holmes v. Salzmann* was decided under the common law and *Yusaf v. Baily* under the old Prescription Act of 1943, but argued that basically the position remained unchanged under the Prescription Act of 1969. I am prepared to accept for the purpose of counsel's argument that the change in wording in the new Act (cf. sec. 5 of Act 18 of 1943 with sec. 12 of Act 68 of 1969) does not provide a ground for distinguishing these two cases, but I am not prepared to accept that the reasoning must be followed. It may well be, as was emphasized in both the judgments referred to, that it will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity or, for that matter, when he learned the date on which the delict had been committed.

But that difficulty must not be exaggerated. It is a difficulty which faces litigants in a variety of cases and may cause hardship – but hard cases, notoriously, do not make good law. It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See R v *Cohen*, 1933 T.P.D. 128. However the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by INNES, J., in *Union Government (Minister of Railways) v. Sykes*, 1913 A.D. 156 at p. 173, that

'less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required'

But the fact that less evidence may suffice does not alter the onus which rests on

the respondent in this case."

This decision was also quoted with approval by *Harms JA* in *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) 244 at 256 G.

Although, there was no *onus* on her to establish the date on which prescription commenced to run, she testified that only after watching a television show in August 1997, had she realized that the sexual abuse had not been her fault, that she was not the only abused child in the world and that the abuse was the cause of her psychological problems.

This phenomenon has become known as 'late discovery' of the cause of psychological damage.

During the last twenty to thirty years extremely disturbing evidence of child abuse and in particular, child sexual abuse, came to light in numerous jurisdictions. In Canada, for example, the Badgely Report, (1984), revealed that one in two girls and one in three boys are the victims of unwanted sexual advances before they reach the age of eighteen. Three out of five of these victims were threatened or physically coerced. See '*Consultation Paper on The Law of Limitation of Actions Arising from Non-Sexual Abuse of Children' published by The Law Reform Commission of Ireland – August 2000*.

This has led to a 'growing social awareness that sexual abuse of children is an endemic problem that oftens translates into emotional and spiritual devastation'. *See Mark E Roseman – Adult Survivors of Childhood Sexual Abuse: Revisiting the California Statute of Limitations* – www.smith-lawfirms.com/California.html.

Of importance, it has become recognized in many jurisdictions that these emotional and spiritual devastations could lead to situations where the real causes of mental problems are not 'discovered' until many years later.

This led to a number of law reform commission reports and amendments to statutes of limitations including numerous such statutes in the USA.

See The Advocate Times http://alterboys.tripod.com/Faith/Extending_thex.html as follows:

"The majority of the states now have some type of provision extending the statute of limitations for adult survivors of CSA, although the remedy varies depending upon state. See National Survey of Extended and Discovery-Based Statutes of Limitation Applicable to Claims of Childhood Sexual Abuse (rev. 1997). Some of the extended periods are provided for by legislative statute, and others are contained in 'tolling' doctrines adopted by the courts. A tolling doctrine is a rule that postpones the date from which a statutory period is counted. A simple example would be a statute that that provides for 'minority tolling.' A statute that might runs 3 years from the date of the injury would run 3 years from achieving the legal age of majority (usually age 18). In some instances, tolling provisions provide a grace period if the victim is under a statutorily described disability when the statute expires (runs out).

Delayed Discovery. Provisions based upon delayed discovery of the fact of the injury, i.e. the recovery of repressed memory. The statute of limitations would begin to accrue on the date that the memory was recovered. Delayed discovery provisions have been instituted by legislative statures and by courts adopting or applying 'common law' (judge made) doctrines.

Delayed Discovery/Realization. Provisions based upon discovery of the injury and/or the fact that the injury or illness suffered by the victim was caused by the abuse. For an example, see Atty. Jo-Hanna Read's explanation of how Washington's statute works.

Incapacity Tolling. Many states have general provisions which toll statutes in the event of mental incapacity or insanity. Some jurisdictions have held that repressed memory or post-traumatic stress disorder constitutes 'insanity' sufficient to toll the limitations period.

The Consultation Paper no. 251 of the Law Commissions for England and Wales, reads as follows par. 13.19 – par 13.22, 10.75, 10.97, 10.98

> **"**13.9 We discussed above the purpose of limitations law. Limitations periods counter the unfairness that would attach to a defendant if a claim was enforceable for an indefinite period. In addition, with the passage of time it may become difficult either to prove or disprove a claim and, moreover, it is thought proper that a plaintiff should act promptly to enforce a claim. Limitations law balances issues of fairness to the plaintiff and fairness to the defendant, by giving the plaintiff a limited amount of time within which to bring a claim, and affording the defendant protection from proceedings by the plaintiff after that time has expired. When it comes to sexual abuse cases, however, there are persuasive arguments that the balance should be adjusted in favour of the plaintiff, and it has been argued that no limitation period should apply to such claims.
>
> 13.20The Ontario Limitations (General) Bill 1992, incorporating the recommendation of the Ontario Limitation Act Consultation Group in their 1991 report, provided that no limitation period should be applied where the proceedings arise 'from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether or not financially'. A number of reasons were given by the

Consultation Group for this recommendation. It thought that the imposition of a limitation period would reward assailants who had traumatised and silenced the victim. Moreover, it thought that in the case of sexual assault public policy would be better served by allowing the plaintiff to bring an action against the defendant rather than putting an end to the venting of old disputes. The defendant was unlikely to be prejudiced by loss of evidence as it was his or her conduct that was in issue:

The plaintiff [was] more likely to face evidentiary problems, because the assault will often have taken place when the plaintiff was young or otherwise vulnerable.

In addition, it thought that it was unlikely that the plaintiff would delay in bringing the claim as it was essential to the healing process.

13.21 Further more, in its decision in KM v HM, the Supreme Court of Canada said that although

There are instances where the public interest is served by granting repose to certain classes of defendants … there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer to consequences, clearly militates against any guarantee of repose.

As to the argument that the evidence may be stale, La Forest J (with whom the other judges agreed) said that this was a characteristic of most childhood sexual abuse cases and, in any case, much of the evidence will be direct evidence from the parties

themselves rather than corroborative. Finally, with respect to the argument that a plaintiff must act diligently and not sit on their rights, the Court thought that this was not persuasive here because the damage remains latent until adulthood, and even when the damage is apparent the connection between the incest and the injuries may not be made, and social forces discourage victims from coming forward.

13.22 We note that the Law Reform Commission of Western Australia commented with respect to the proposal that in certain circumstance there should be no limitation period for claims by sexual victims that, 'the arguments advanced in favour of such a provision are in essence the same arguments as those put forward in KM v HM to support the view that the limitation period should not begin to run until the discoverability requirement is satisfied. In most cases, the plaintiff's right to sue will be preserved by the discoverability period… . We agree. Courts in the United States have also generally applied limitation periods to claims by sexual abuse victims on the basis that they start to run when the cause of action becomes discoverable.

10.75 The decision in Invercargill City Council v Hamlin could therefore be argued not to have any direct application in a wider context. But the ambit of the discoverability rule has been broadened by two subsequent decisions of the New Zealand Court of Appeal. First in S v g discoverability was applied to an action arising out of sexual abuse. The defendant had been convicted of indecently assaulting the plaintiff when she was below the age of majority. The plaintiff, some years later, brought an action against the defendant in negligence and in trespass to the person in respect of psychological and emotional damage caused by the abuse. It was

held that the plaintiff's cause of action in negligence began when the plaintiff discovered, or should have discovered, a causal link between that damage and the abuse. In reaching this decision the court drew upon the reasoning of the Supreme Court of Canada in KM v HM. As regards the claim for trespass to the person, which did not require proof of damage, the Court of Appeal supported the trial judge in holding that a discoverability test should be applied, but with regard to the date on which the plaintiff realized, or should have realized, her lack of genuine consent to the plaintiff's actions. The court recognized that this could mean that time could run in respect of trespass claims before it started to run in a negligence claim on the same facts, but the rules relating to fraudulent concealment could operate to delay the start of the limitation period.

10.97 One of the most problematic areas of latent damage is that sexual abuse, where there can be a very delay between the abusive acts and the manifestation and understanding of the effects of those acts, for example as psychiatric illnesses. Some jurisdictions have legislated specifically on claims for sexual abuse. In British Columbia, Newfoundland and Saskatchewan there is no limitation period at all for a cause of action based on misconduct of a sexual nature. In Ontario the Limitations Act Consultation Group appointed by the Attorney-General recommended that limitation periods should be abolished in sexual abuse claims. In Nova Scotia a cause of action for various types of trespass to the person will be deemed not to have arisen until the plaintiff is aware of the harm and of its causal relationship with the abuse, and time will not run while the plaintiff is not reasonably capable of commencing proceedings because of physical mental of psychological conditions resulting from the abuse.

10.98 But the Canadian courts have also taken an active role in dealing with this problem. In KM v HM the plaintiff had been abused during the period from 1964 to 1974, between the ages of 8 and 17. She later married, but her marriage failed in 1983. She started to attend meetings of self-help group in 1984 and commenced therapy in 1984, and it was only then that she realized that the psychological damage she had suffered was due to the abuse. She commenced proceedings in 1985. The Supreme Court of Canada held that under the relevant statute time should run against the plaintiff when she was reasonably capable of discovering the wrongful nature of the acts perpetrated against her and, by a majority, that it should be presumed that a plaintiff in these circumstances would not discover the connection between the abuse and the injuries suffered until therapy began. Moreover, the court unanimously held that in any case the defendant had committed a breach of fiduciary duty, to which no limitation period applied under the Ontario legislation.

Judgment was reserved, but when considering the submissions relating to prescription and the evidence led about the late discovery of the effects and consequences of the sexual assaults, it became apparent that the provisions of the 1969 Prescription Act might not be applicable.

Counsel were then requested for additional submissions on this aspect.

This led to an amendment to *Hoogenhout*'s Special Plea, who now pleaded prescription in terms of this 1943 Act as an alternative to the provisions of the 1969 Act.

A further alternative was then added to the Replication. It reads as follows:

"7(b) In terms of section 5(1) (c) of the Prescription Act 18 of 1943, the wrong upon which the Second Plaintiff's claim for damages is based was first brought to her knowledge during that year, [1997] alternatively the Second Plaintiff might reasonably have been expected to have knowledge of that wrong during that year."

Section 16 of the 1969 Act reads as follows:

"***16. Application of this Chapter.*** *– (1) Subject to the provisions of subsection (2)(b), the provisions of this chapter shall…….. apply to any debt arising after the commencement of this Act. (Afr. 'van toepassing op enige skuld wat na die in werkingtreding van hierdie Wet ontstaan')*

(2) The provisions of any law-

a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement;

(Afr. ''n skuld wat voor daardie in werkingtreding ontstaan het')

b) …

shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation."

It is clear that the delicts relied upon by *E. Z.* and which had occurred between 1956 and 1965 could not be '*debts*' which had arisen after the commencement of the 1969 Act and are thus governed by the provisions of the 1943 Act.

The 1943 Act provided for a prescriptive period of three years in respect of actions for damages other than those for which another period had been laid down (sec. 3 (2)(c) (vi)).

No other period had been laid down in respect of assaults (sexual or otherwise) and the prescriptive period was thus three years.

The 1943 Act also provided that in respect of any action for damages, other than for defamation, prescription began to run

'from the date when the *wrong* (Afr. '*onregmatige daad*') upon which the claim for damages is based was first brought to the knowledge of the creditor, or from the date on which the creditor might reasonably have been expected to have knowledge of such *wrong*, (Afr. '*van bedoelde daad*') whichever is the earlier date' (sec 5(1)(c)).

(Contrast the 1969 wording "prescription shall commence to run '*as soon as the debt is due'* (Afr. '*sodra die skuld opeisbaar is*') and *'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises')*

The '*wrong*' is the unlawful act or delict and, in the instant case, the assaults which were committed by Hoogenhout.
The '*dates*' of the '*wrongs*' are the dates upon which the assaults were committed, and not the dates upon which their effects were realised.

See *Oslo Land Co Ltd v The Union Government* 1938 AD 584 and *Administrator of the Transvaal v Crocodile Valley Citrus Estates (Pty) Ltd* 1942 AD 109.

In terms of section 7 (1) (b) of the 1943 Act, the running of prescription was

suspended '*during the period of disability of the creditor*' (Afr. '*solank as wat die skuldeiser regsonbevoeg is*').

In my view it is clear that *E. Z.* was not a disabled ('regsonbevoegde') person and that her claims prescribed 3 years after she had attained her majority in 1973.

The joinder of the Minster was necessitated by the Rule of Court. In view of the worldwide awareness of the extent of child abuse and the recent recognition of its devastating consequences, it could not, in my view, be suggested that the constitutional issue was raised either frivolously, vexatiously or from improper motives.

In the circumstances, I am of the view that an order for costs in favour of the Minister should not be made.

Both *E. Z.* and *Hoogenhout* relied upon the wrong Prescription Act. In the circumstances I am of the view an order for costs in favour of *Hoogenhout* would be inappropriate.
In the result *E. van Z.*'s action is dismissed and no orders as to costs are made.

H C NEL